In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 290

ARCHIE E. MERRIOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A) is not yet reported.

JURISDICTION

The opinion of the Court of Claims was entered on November 15, 1963. The order of the Court of Claims denying petitioner's motion for rehearing and for leave to file an amended petition was entered on April 17, 1964. The petition for a writ of certiorari was filed on July 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims properly dismissed petitioner's alternative claims for disability retirement pay and for active duty pay from the date of his release from military service.

STATUTE INVOLVED

28 U.S.C. 2501 provides in pertinent part that:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, within six years after such claim first accrues.

STATEMENT

In September 1940, petitioner entered on extended active duty with the rank of Second Lieutenant in the National Guard of the United States. Pursuant to a subsequent finding of an Army Retiring Board that he was physically incapacitated, petitioner was released from active duty effective January 1, 1945. The Retiring Board, after a hearing, denied petitioner's claim for disability retirement pay on the ground that his physical incapacity antedated his entrance on active service, and the Board's findings were approved by the Secretary of War on October 19, 1944.

On December 28, 1959, more than fourteen years after his release from active duty, petitioner filed with the Army Disability Review Board an application for review of the Army Retiring Board's findings. After a hearing, the Review Board affirmed the Retiring

Board's decision that petitioner was not entitled to disability retirement pay, but did so on the ground that petitioner was not incapacitated for active service at the time of his release. Petitioner thereupon applied to the Army Board for Correction of Military Records for correction of his records to show either (1) that he was entitled to disability retirement pay from his release on January 1, 1945, or (2) that he was entitled to active duty pay from that date. He contended that if, as the Review Board determined, he was not incapacitated on the date of his release, his discharge was erroneous and he should be entitled to active duty pay. This application was denied.

On September 20, 1961, petitioner filed his petition in the Court of Claims. He maintained that he was entitled either (1) to disability retirement pay on the basis of the Review Board's finding that his disability did not predate his entry on active service, or (2) to active duty pay on the basis of the Review Board's finding that he was not permanently incapacitated on the date of his discharge.

On the government's motion, the Court of Claims dismissed the petition. It held that the claim for disability retirement pay was barred by the six-year statute of limitations, 28 U.S.C. 2501. It further held that the alternative claim for active duty pay should be dismissed because (1) petitioner failed to allege or show that he objected to his discharge in 1945 so that he must be considered to have waived any invalidity; (2) petitioner's service as a National Guard officer was at the will of the government with

no vested right to remain on active duty; and (3) there was no reason to believe that petitioner, whose release occurred toward the close of the war, would have been retained on active duty unlike millions of other reservists.

ARGUMENT

In dismissing petitioner's action the Court of Claims correctly applied settled principles of law which it had recently announced in an authoritative decision. Its ruling does not conflict with decisions of any other court. Accordingly, no question is presented meriting review by this Court.

1. Petitioner's allegation (Pet. 7-8) of a conflict between the Court of Claims' holding that his demand for disability retirement pay was time-barred and its decision in *Friedman* v. *United States*, 310 F. 2d 381, certiorari denied, 373 U.S. 932, is entirely without merit. In *Friedman*, the Court of Claims said (310 F. 2d at 390):

> [W]here a proper board has acted *finally* the running of the statute is not tolled by later considerations by other boards or agencies. In particular, where full action by a Retiring Board has been had (or refused), later review by the Disability Review Board or the Correction Board does not toll the statute. [Citations omitted.] These cases hold that the *final* action of the first proper board to act (finally) is decisive for limitations purposes.

Despite this explicit language, petitioner urges that the Retiring Board decision in 1944 was not "final"

within the meaning of *Friedman* because it was subject to review by the Review Board in 1959. However, the plain words of the *Friedman* opinion—that "full action by a Retiring Board" and "later review by the Disability Review Board or the Correction Board" does not toll the statute—dispose of this contention.

2. Similarly, without substance is petitioner's assertion that Congress, by permitting an officer discharged for disability to seek review before a military Review Board within 15 years of his discharge (10 U.S.C. 1554(c)),* intended to permit an action to be brought in the Court of Claims within six years of the Review Board's decision. This argument was squarely and properly rejected by the Court of Claims in *Friedman* and in *Odell* v. *United States*, 135 F. Supp. 539. For the claim for disability retirement pay "first accrues" (28 U.S.C. 2501) when the demand is denied by final action of the first proper administrative board to act. Once a claim for disability retirement pay is denied in this manner, it becomes judicially reviewable. *Duff* v. *United States*, 133 Ct. Cl. 161, 135 F. Supp. 527. While the right to further administrative consideration may be available, it is not necessary to seek it in order to obtain judicial review. *Ogden* v. *Zuckert*, 298 F. 2d 312 (C.A.D.C.); *Lipp* v. *United States*, 301 F. 2d 674 (Ct. Cl.), certiorari denied, 373 U.S. 932. It is most consistent with this statutory scheme to read Congress' intention as providing *either* judicial review

* Amended in 1962 and now contained in 10 U.S.C. (Supp. IV) 1554(a).

within six years of the final action of the Retiring Board *or* administrative reconsideration within 15 years of that action. It is hardly likely, on the other hand, that Congress intended to enlarge the period for judicial review to 21 years from the date of the Retiring Board's decision by interposing the 15-year limitations period for administrative reconsideration.

3. The Court of Claims correctly rejected petitioner's alternative claim for active duty pay. Considering the nature of his illness—whether or not it amounted to physical incapacity—and the time of his discharge, it is highly unlikely that he would have been retained on active duty. It was proper for the court to consider these factors, in addition to petitioner's failure to allege or show that he had sought to remain in active service, in deciding whether petitioner would have been entitled to his requested relief if his factual allegations were true.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

SHERMAN L. COHN,
MARTIN JACOBS,
Attorneys.

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